IN THE HIGH COURT OF BOMBAY AT GOA
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CIVIL REVISION APPLICATION NO. 62 OF 2001

Mrs. Corina Cota,
r/o E/462/B,
Corte de Oiteiro,
Panaji, Goa. ... Petitioner

Versus

1. John Joseph Noronha,
major of age, s/o
Joseph Noronha,
r/o H. No.200,
Chinchinim, Salcete,
Goa, and

2. Antonette Gomes,
H. No.200,
Chinchinim, Salcete,
Goa. ... Respondents.

Shri C. A. Coutinho, advocate for the petitioner.

Shri N. N. Sardessai, advocate for respondent no.1.

Shri A. Nasnodkar, advocate for respondent no.2, absent.

CORAM: S. RADHAKRISHNAN, J.

DATE: 16th August, 2002.

ORAL JUDGMENT

By this Civil Revision Application, the petitioner/original decree-holder, is challenging the Order dated 2nd December, 2000, passed by the learned Civil Judge, Junior Division, Margao, in an application under Order 21 Rules 97 and 99 of the Code of Civil Procedure, 1908, seeking a declaration of nullity and staying of execution of decree passed in Regular Civil Suit No.250/84/D. By the said Order, the learned Judge had directed an enquiry to be held under Section 8-A of the Goa, Daman and Diu (Protection From Eviction) Act,

1975 (hereinafter referred to as the "aforesaid Act"). The contention of the learned counsel for the petitioner is that the aforesaid order suffers from a patent illegality and errors are apparent on the face of the record and the learned Civil Judge, Junior Division, Margao, ought not to have entertained and granted such a relief in the said Execution Application No.32/97/E, at all.

2. The brief facts are that the respondent no.2 herein, who is the mother of respondent no.1, had filed an application under Section 29 of the aforesaid Act for entering her name in the register of mundkars. This application was filed by respondent no.2 in the year 1980. The concerned Mamlatdar after holding an appropriate enquiry under Section 29 of the aforesaid Act ultimately rejected the said application on 30th May, 1983, finding no merit. Aggrieved thereby, respondent no.2 had approached the Additional Collector by way of an appeal, which was also dismissed by the Additional Collector, confirming the findings of the Mamlatdar holding that the respondent no.2 is not entitled to have her name entered in the register of mundkars, as per Section 29 of the aforesaid Act. Thereupon the respondent no.2 again had approached the Administrative Tribunal by way of a revision, which also came to be dismissed on 13th February, 1985. In the meanwhile, the petitioner herein,

namely the original decree-holder, had filed a suit against the said respondent no.2 for possession of the suit house and the land adjacent thereto. The said suit was filed on 3rd October, 1984, which suit came to be decreed in favour of the petitioner on 31st January, 1994, whereby the present respondent no.2 was ordered to vacate the said house alongwith the land adjacent thereto and hand over vacant and peaceful possession to the petitioner herein. In the said suit, respondent no.2 had also filed a counter-claim seeking her right to be protected with regard to the said house, by claiming a right and title over the suit house by way of adverse possession, which claim also came to be dismissed in the said suit. Aggrieved thereby, respondent no.2 had filed an appeal before the learned District Judge, against the said decree dated 31st January, 1994. The learned District Judge had dismissed the said appeal on 1st April, 1999, upholding the decree granted by the trial Court. When the petitioner started initiating the execution proceedings for recovery of the aforesaid house alongwith the land adjacent thereto from respondent no.2, the respondent no.1 herein, who is the son of respondent no.2 filed an application under Order 21 Rules 97 of the Code of Civil Procedure, 1908, on 30th July, 1999, contending that the aforesaid decree dated 31st January, 1994, is a nullity and the same should be set aside and the same cannot come in the way of the right of respondent no.2. In the said

application,the learned Civil Judge, Junior Division at Margao had passed the aforesaid Order on 2nd December, 2000, which reads as under:-

> "Heard on maintainability.
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> It has been held in AIR 1997 SC 856 that even a "stranger can get his claim adjudicated even prior to losing possession to DH". Implication is that, possession, legal or otherwise has to be protected till the claim is adjudicated upon. Else, the appellant/objector would be rendered shelterless. Further implication is that there is no bar for establishing the legal rights of the applicant herein, at the enquiry to be held under O.21 R.97 - 101 of C.P.C. The decisions reported in AIR 1995 SC 358 and 1995 (1) Goa L.T. 318 are also in the same lines. it is true that securing the fruits of the decree would be delayed but in the event of the applicant failing to prove any right, title & interest he shall face the consequences.
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> Objections overruled.
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> Enquiry shall be held.
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> Pronounced in open Court."

3. This Civil Revision Application is against the aforesaid Order passed by the learned Civil Judge, Junior Division, Margao. The learned counsel for the petitioner pointed out that this attempt by respondent no.1 is an abuse of the judicial process in as much as respondent no.1 does not have any independent right over the said house whatsoever. If at all, only respondent no.2 could have claimed any right and the said right also came to be rejected in as much as respondent no.2 had made an application to get her name entered as a mundkar in the

register of mundkars under Section 29 of the aforesaid Act, which came to be rejected by the Mamlatdar, after a full-fledged enquiry. Thereupon respondent no.2 had availed of an appellate judicial remedy where also respondent no.2 could not succeed. In the meanwhile, petitioner had in fact, filed a suit against respondent no.2 contending that respondent no.2 is a rank trespasser and respondent no.2 should be ordered to vacate and hand over vacant and peaceful possession of the suit house alongwith the land adjacent thereto. The suit was duly decreed on 31st January, 1994. In the said suit, the respondent no.2 had claimed title to the suit house by adverse possession, which claim came to be rejected. Even the appeal against the same came to be rejected on 1st April, 1999. Now, at the stage of execution, suddenly the son,namely respondent no.1 herein, tried to object to the said execution by filing an application under Order 21 Rules 97 and 99 of the Code of Civil Procedure, 1908. In the said application, respondent no.1 has prayed for a declaration that the Judgment and Decree dated 31st January, 1994, in Regular Civil Suit No.250/84/D be declared null and void. Pending the same, the respondent no.1 had prayed that the petitioner ought not to interfere by executing the said decree.

4. Learned counsel for the petitioner submits that respondent no.1 claims to have filed an application

under Section 8 A of the aforesaid Act, before the Mamlatdar for a declaration that he is a protected mundkar, after the impugned Order that was passed by the learned Civil Judge, Junior Division, Margao. The learned counsel for the petitioner referred to a Judgment of our High Court in **Smt. Chhaya Vishnu Sadavarte** vs. **Smt. Indubai alias Indumati Bhaskar Bhavsart & Ors.**, 1992 (2) Bom.C.R. 666, wherein in almost similar facts and circumstances, this Court had held that the said objection with regard to warrant for possession was not liable to be maintained. In the said case the petitioner therein was one of the daughters of the deceased, who was not brought on record as a defendant. It appears that the suit proceeded therein and was decreed and the decree was maintained right up to the High Court. In the Darkast proceedings the petitioner therein had filed an objection objecting to the maintainability, contending that she was a major at the time of the death of her father and that as she was not brought on record in the suit, therefore the decree was not binding on her. This Court after considering the judgment of the Apex Court in **Harihar Prasad Singh** vs. **Balmiki Prasad Singh**, AIR 1975 SC 733, held that the learned Civil Judge had rightly concluded that though the petitioner had not been brought on record as a defendant in the suit, she was still very much bound by the said decree. The learned counsel for the petitioner thereafter referred to a Judgment of the

Supreme Court in **Silverline Forum Pvt. Ltd.** vs. **Rajiv Trust & Anr.,** AIR 1998 S.C. 1754. In the said matter a sub-tenant who was not a party to the decree for eviction resisted the execution of the decree. In the said Judgment the Apex Court after considering the various Judgments and the scope of Order 21 Rule 97 of the Code of Civil Procedure, has observed as under:-

> "19. Such a sub-tenant as the second respondent is bound by the decree of ejectment. Section 16 of the W.B. Act deals with 'creation and termination of sub-tenancies to be notified.' Sub-section (1) of Section 16 relates to sub-tenancies created after the commencement of the W.B. Act. Sub-sections (2) and (3) deal with sub-tenancies created before the commencement of the W.B. Act. As all the sub-tenancies in this case were created after the commencement of the W.B. Act it is not necessary to consider the latter two sub-sections. Hence Section 16(1) alone is extracted below:
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> > '(1) Where after the commencement of this Act, any premises are sub-let either in whole or in part by the tenant with the previous consent in writing of the landlord, the tenant and every sub-tenant to whom the premises are sub-let shall give notice to the landlord in the prescribed manner of the creation of the sub-tenancy within one month from the date of such sub-letting and shall in the prescribed manner notify the termination of such sub-tenancy within one month of such termination.' "

5. The learned counsel for the petitioner thereafter brought to my notice the Division Bench

Judgment of our High Court in **M/s. West Coast Paper Mills Ltd.** vs. **The Trustees of the Port of Bombay & Ors.,** 1999 (2) Bom.C.R. 425, wherein this Court has clearly held that an application under Order 21 Rules 97 and 101 of the Code of Civil Procedure, can be raised only by a party who has an independent right and not otherwise. Similarly, the learned counsel for the petitioner also referred to and relied on another Judgment of our High Court in **Mitra of Archdiocese of Goa and Daman** vs. **K. Vijayadharan,** 1999 (2) Goa L.T. 97, wherein this Court while dealing with the right of a mundkar under the aforesaid Act has held that if a person wants to claim such a right, there must be a pleading to the effect that in the said suit house he has a 'fixed habitation' and claims to have a right as a mundkar.

6. Learned counsel for the petitioner also referred to another Judgment of our High Court in **Shri Ubaldino Oliveira** vs. **Shri Sadanand Ladu Borkar & Ors.,** 1995 (1) Goa L.T. 318, wherein, in para 7 it is held in very clear terms that a person can resist the execution of a decree only if he has an independent right of his own. On the same lines, the learned counsel for the petitioner also brought to my notice another Judgment of the Hon'ble Supreme Court in **Brahmdeo Chaudhary** vs. **Rishikesh Prasad Jaiswal & Anr.,** AIR 1997 SC 856, where also it is held in no uncertain terms that the claim under Order 21 Rules 97

and 99 of the Code of Civil Procedure can only be by a person who is having an independent right.

7. The learned counsel for the petitioner, Shri Coutinho, also referred to a Judgment of the Rajasthan High Court in **Jagdish Narain** vs. **Satish Chand Goswami & Ors.**, AIR 1997 Raj. 209, wherein the High Court has held that if the executing court finds that objections are frivolous and have been filed just to delay the execution proceedings, the same can be dismissed summarily. It is also held that the execution court is not enjoined by the statute to frame an issue and dispose of the same in the same manner as the suit, nevertheless the executing court is under an obligation to decide the dispute in a judicial manner.

8. Finally, the learned counsel for the petitioner also referred to a recent Judgment of the Hon'ble Supreme Court in **N.S.S. Narayana Sarma & Ors.** vs. **M/s. Gladstone Exports (P) Ltd. & Ors.**, AIR 2002 SC 251, wherein in para 19, the Apex Court has clearly held that the person claiming must have an independent right to the property from which he is sought to be evicted in execution of the said decree.

9. Apart from the above, the learned counsel for the petitioner also brought to my notice that in the

affidavit in reply filed by the petitioner, with regard to the aforesaid application under Order 21 Rules 97 and 99 of the Code of Civil Procedure, 1908, taken out by the respondent no.1, in paragraph 9, it is categorically mentioned that the present respondent no.1 has been all throughout a resident at Mumbai and he was born on 9th June, 1961, wherein it appears that he had undergone his primary education in a School of Municipal Corporation of Greater Bombay, at Jaganath Bhatkar Marg, Parel, Mumbai and where he had studied from 8th October, 1972 to 24th April, 1978. He was promoted to Std.VIII thereafter. He continued to stay in Mumbai. Now it appears that the said respondent no.1 is in gainful employment with the Home Guards at Margao and is a resident of Navelim, Salcete, Goa and is not a resident of Chinchinim, Goa at all. These facts are not controverted at all by the respondent no.1 by filing any counter-affidavit. Apart from the above, in the said reply, it is also pointed out that even the ration card issued in the year 1996 shows the head of the family to be the judgment-debtor, namely respondent no.2 herein and it is pertinent to note that in the said ration card also the name of respondent no.1 does not figure. Therefore, the learned counsel for the petitioner had contended that in fact the respondent no.1 has all throughout been a resident of Mumbai and if at all only respondent no.2 could have claimed any right as a mundkar. Whereas respondent no.2 had lost all her claim before

various authorities and ultimately even against the decree of the trial court, the lower Appellate Court had upheld the trial court decree. Further, respondent no.2 has not challenged the same. At this stage of execution, respondent no.1, who does not have any independent right whatsoever with regard to the suit house, claiming the right to be a mundkar, cannot object to the same by filing the said application whereby the learned Civil Judge by his Order dated 2nd December, 2000, had directed an enquiry to be held. Learned counsel for the petitioner strongly contends that this application is nothing short of abuse of judicial process and under the guise of an application under Order 21 Rule 97 of the Code of Civil Procedure, 1908, this application ought not to be permitted at all and ex facie the respondent no.1 has no right whatsoever as a mundkar regarding the said property. Under these circumstances, the learned counsel for the petitioner contends that the learned Civil Judge, Junior Division, Margao, had committed an error apparent on the face of the record and, in fact, he has committed a jurisdictional error by directing such an enquiry in as much as respondent no.1 has absolutely no title or right with regard to the said property, as pointed out hereinabove. Under these circumstances, the learned counsel for the petitioner prays for setting aside the aforesaid Order dated 2nd December, 2000.

10. The learned counsel appearing for the respondent no.1 contends that respondent no.1 has an independent right to claim the right as a mundkar under the aforesaid Act and, therefore, the Order of the Civil Judge, Junior Division, Margao, is fair and proper, whereby the Judge had directed an enquiry to be conducted with regard to the respondent no.1's claim as a mundkar. The learned counsel for the respondent no.1 referred to and relied upon a Judgment of the Hon'ble Supreme Court in **Haji Suleman Haji Ayub Bhiwandiwala** vs. **Narayan Sadashiv Ogale,** 1967 (84) B.L.R. 122, to contend that this Court under Section 115 of the Code of Civil Procedure should only interfere if there is some patent illegality or material irregularity and not with regard to errors relating to material defects of procedure. There is no dispute about the above proposition of law. Whereas in the instant case the challenge is that the respondent no.1 does not have any independent right whatsoever and there is no material produced also to indicate that the petitioner has any independent right to claim the right as a mundkar. All the more it is important to note that when his own mother, respondent no.2 herein, had lost at all levels before the various authorities with regard to her claim as mundkar and also respondent no.2 had accepted as final, the lower Appellate Court decree, upholding the trial court decree, the respondent no.1 apparently has not even been staying at Chinchinim, whereas he has all

throughout been in Mumbai and now comes to claim such a right, cannot be permitted to do so.

11. The learned counsel for respondent no.1 also referred to another Judgment of our High Court in **Gaurihar Baburao Batane & Ors.** vs. **Ashok Banudas Gajare & Anr.,** 2000(4) Mh.L.J. 667, wherein also our High Court has taken a view that unless and until there is an independent legal right there cannot be any resistance to the execution of a decree under Order 21 Rule 97 of the Code of Civil Procedure, 1908.

12. After having heard both the learned counsel at length and after having perused the pleadings as well as the Judgments referred to and relied upon by both the sides, the following picture emerges. Respondent no.2, who is the mother of respondent no.1 had sought to contend that her name ought to be entered in the register of mundkars under Section 29 of the aforesaid Act wherein after a full-fledged enquiry the Mamlatdar found that respondent no.2's name cannot be entered as mundkar, as she had no right at all. Subsequently, the said finding was confirmed by the Additional Collector and even the Administrative Tribunal had concurred with the same. In the meanwhile, in 1984, the petitioner herein had filed a suit against the said respondent no.2 for eviction on the ground that she is a trespasser. In the said suit also,

respondent no.2 had taken a contention that she has a right over the suit house by way of adverse possession. The suit was decreed in favour of the petitioner herein and the counter-claim of respondent no.2 claiming adverse possession was dismissed. Aggrieved thereby, respondent no.2 had preferred an appeal which appeal also came to be dismissed by the District Court. Thereupon the decree is sought to be executed. At this belated stage suddenly respondent no.1 comes into the picture to oppose the execution of the decree, who is also 38 years old at the time when he sought to oppose. From the record, it is clear that respondent no.1 has all throughout been in Mumbai and only his mother, respondent no.2, who had sought to claim her right as a mundkar had lived in Chinchinim. Respondent no.1's claim appears to be a totally concocted and baseless claim as a mundkar. It is nothing but a desperate attempt to avoid execution of the aforesaid decree. As clearly held by the various judgments referred to herein, if at all respondent no.1 had to claim any right, he must show that he has an independent right, which respondent no.1 has totally filed to establish and this application is nothing but an abuse of the judicial process of the court. Under these circumstances, the Order of the learned Civil Judge, Junior Division, Margao dated 2nd December, 2000, cannot be sustained at all, and is liable to be quashed and set aside.

13. Under these circumstances, the Civil Revision Application is made absolute in terms of prayer Clause (a) with costs.

S. RADHAKRISHNAN, J.

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